



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 8, 1998

Ms. Tenley A. Aldredge
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR98-2999

Dear Ms. Aldredge:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 120027.

The Travis County Sheriff's Office (the "sheriff's office"), which your office represents, received a request for a variety of information concerning "the Travis County jail facilities, jail policies, investigations, and other information." In response to the request, you submit to this office for review a representative sample of the information which you assert is responsive.¹ You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions and arguments you have raised and reviewed the submitted information.

Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten *business* days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See Gov't Code*

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

§ 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

You state that the sheriff's office received the request for information on July 31, 1998; however, "[t]he Sheriff's Office did not forward the open records request to the office of the County Attorney until after the ten-day deadline for requesting a decision." Therefore, you did not request a decision from this office until September 11, 1998, more than ten business days after the sheriff's office received the request. In accordance with sections 552.301 and 552.302, the information at issue is presumed public. Furthermore, since section 552.103 is a discretionary exception, the failure to timely raise this exception results in the waiver of its protection. *See generally* Open Records Decision Nos. 551 (1990). However, based on your arguments under section 552.101, we conclude that you have shown a compelling interest for withholding some of the requested information. *See* Open Records Decision No. 473 (1987).

Initially, we note that the submitted documents include what appear to be autopsy reports which are considered to be public by statute. The Open Records Act's exceptions do not, as a general rule, apply to information made public by other statutes. Open Records Decision No. 525 (1989). Section 11, article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. Such records shall be public records.

Code Crim. Proc. art. 49.25, § 11. Pursuant to section 11, to the extent the requested information includes autopsy records, such information is a public record and must be released to the requestor. *See also* Open Records Decision No. 529 at 8 (1989).²

²In Open Records Decision No. 529 (1989), this office found no conflict between subchapter F of chapter 81 of the Health and Safety Code and section 11 of article 49.25 of the Code of Criminal Procedure. Subchapter F provides that AIDS test results are confidential. However, this office concluded that the subchapter F confidentiality provision "does not control the performance or disclosure of an AIDS test done as part of an autopsy under article 49.25." Open Records Decision No. 529 (1989). We concluded that the autopsy report, including the AIDS test results, was public and must be disclosed. *Id.*

We also note that article 49.18(b) of the Code of Criminal Procedure requires that law enforcement agencies complete custodial death reports and file those reports with the attorney general, who "shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party." In Open Records Decision No. 521 (1989), this office held that under article 49.18(b), in conjunction with a directive issued by the Office of the Attorney General, section one of custodial death reports filed with this office is public information. All remaining portions of the custodial death report, *i.e.* Parts II through V, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. Open Records Decision No. 521 at 5 (1989). Accordingly, the sheriff's office must withhold all portions of Parts II through V of all the custodial death reports. However, Part I of the custodial death report is expressly made public under article 49.18(b), and therefore this portion of the custodial death reports must be released.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has previously ruled that, generally, the details of an attempted suicide are protected by common-law privacy. See Open Records Decision No. 422 (1984) (presumption that details of self-inflicted wound, beyond mere fact that it was self-inflicted, are excepted by common-law privacy may be overcome by demonstration that public has substantial interest in particular incident). However, the right of privacy is personal to an

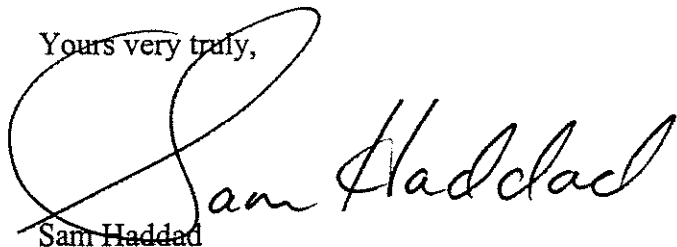
individual and lapses upon death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 (1981). Therefore, to the extent the submitted records concern a deceased individual, the sheriff's office may not withhold such records under common-law privacy. *See* Gov't Code § 552.352.

Section 552.101 also encompasses information protected by other statutes. Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). The submitted documents include CHRI that is excepted from disclosure pursuant to section 552.101. The sheriff's office must withhold this information from disclosure.

Finally, you contend that portions of the submitted records consist of medical information made confidential under section 552.101 of the Government Code in conjunction the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. The MPA protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). To the extent the submitted records include medical records, we note that access to such records is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both the confidentiality of medical records and certain statutory access requirements. *Id.* at 2. Therefore, medical records submitted to this office for review may only be released as provided by the MPA.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A large, stylized handwritten signature in black ink, reading "Sam Haddad". The signature is written over the typed name "Sam Haddad".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/mjc

Ref.: ID# 119900

Enclosures: Submitted documents

cc: Mr. Robert Notzon
509 West 16th Street
Austin, Texas 78701
(w/o enclosures)